SUPREME COURT, U.S.
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No. 92-1643

In The

# Supreme Court of the United States

October Term, 1992

FELICE LIPPERT,

*Petitioner,*

v.

DELTA AIR LINES, INC. and
THE WACKENHUT CORPORATION,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Florida Supreme Court**

## RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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21

## QUESTION PRESENTED

Whether a commercial airline's liability for property lost at an airport security checkpoint operated by the airline is limited by its federal tariff where the checkpoint has been established and operated as required by federal law and regulations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATUTES AND REGULATIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE WRIT ..... 5

POINT I

THE FLORIDA SUPREME COURT HAS PROPERLY INTERPRETED THE POSTED TARIFF AND TICKET ..... 5

POINT II

LIPPERT ACKNOWLEDGES THAT THE TARIFF APPLIES "TO BAGGAGE GIVEN INTO THE AIRLINE'S CUSTODY FOR . . . TRANSPORT OR TO STORE TEMPORARILY" (Pet., p. 11), AND THIS MUST INCLUDE A SECURITY CHECKPOINT . . . 9

POINT III

APPLICATION OF THE TARIFF PERMITS THE AIR CARRIER TO DETERMINE ITS RATES ACCORDING TO RISKS ASSUMED ..... 13

POINT IV

PUBLIC POLICY SUPPORTS APPLICATION OF THE TARIFF ..... 14

POINT V

APPLICATION OF THE TARIFF IS NECESSARY FOR UNIFORMITY OF RESULTS ..... 15

CONCLUSION ..... 16

# TABLE OF AUTHORITIES

Page

CASES

*Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165 (S.D.N.Y. 1984) ..... 7

*Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla.), *aff'd.*, 477 F.2d 564 (5th Cir. 1973) ..... 13

*Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp 611 (S.D.N.Y. 1955) ..... 8

*Emery Air Freight Corp. v. United States*, 499 F.2d 1255 (Ct. Cl. 1974) ..... 11

*Feature Enterprises, Inc. v. Continental Airlines*, 745 F. Supp. 198 (S.D.N.Y. 1990) ..... 6

*Julius Young Jewelry Mfg. Co. v. Delta Air Lines*, 414 N.Y.S.2d 528 (App. Div. 1979) ..... 8

*Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992) ..... 15, 16

*O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989) ..... 16

*Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338 (8th Cir. 1971) ..... 11, 12

*Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) ..... 13

*Tremaroli v. Delta Air Lines*, 458 N.Y.S. 2d 159 (N.Y. City Civ. Ct. 1983) ..... 6

*Von Anhalt v. Delta Air Lines, Inc.*, 735 F. Supp. 1030 (S.D. Fla. 1990) ..... 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

49 U.S.C. App. § 1305(a)(1) ..... 15

49 U.S.C. § 1356 ..... 1, 2, 8

49 U.S.C. § 1502 Note ..... 8

14 C.F.R. § 108.9(a) ..... 1, 2

14 C.F.R. § 254.1 ..... 8

OTHER AUTHORITY

*Complaint against limitation of liability tariffs of Braniff Airways, Inc. and Northwest Airlines, Inc.*, Docket 40373 (U.S. Dep't of Transp. Order Dismissing Complaint issued Dec. 2, 1987) ..... 14

## RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

The Respondents, Delta Air Lines, Inc. and The Wackenhut Corporation[1], request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Florida Supreme Court entered December 3, 1992.

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## STATUTES AND REGULATIONS INVOLVED

In addition to those regulations and tariffs cited by Lippert, the following statutes and regulations are relevant:

49 U.S.C. § 1356 provides, in pertinent part:

> Screening procedures for passengers
>
> The Administrator shall prescribe or continue in effect reasonable regulations requiring that all passengers and *all property intended to be carried in the aircraft* cabin in air transportation or intrastate air transportation be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation.

14 C.F.R. § 108.9(a) provides:

> Each certificate holder required to conduct screening under a security program shall use the

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[1] Hereinafter "Delta" and "Wackenhut." Felice Lippert will be referred to as "Lippert."

> procedures included, and the facilities and equipment described, in its approved security program to prevent or deter the *carriage aboard airlines* of any explosive, incendiary, or a deadly or dangerous weapon on or about each individual person or *accessible property*, and the carriage of any explosive or incendiary in checked baggage.

(emphasis added)

## STATEMENT OF THE CASE

The Respondents generally adopt the statement of the case in the opinion of the Florida Supreme Court (Pet. App. A, 2a-6a)[2] with the addition of the following specific facts:

Lippert and her husband held tickets on an August 8, 1986 Delta flight from Palm Beach International Airport to New York. (Pet. App. G) Before they were permitted to proceed to the departure gate, the Lipperts had to pass through a security checkpoint for the inspection of all property intended to be carried in the aircraft, as mandated by § 49 U.S.C. 1356. This security screening is required to "prevent or deter the carriage aboard airplanes of any explosives, incendiary, or a deadly or dangerous weapon on or about each individual person or accessible property . . . " 14 C.F.R. § 108.9(a).

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[2] All references to the Petitioner's Appendix will be referred to, as above, by letter and page number.

Lippert and her spouse were both experienced travellers. Lippert travelled approximately once a month and her husband travelled two or three times each month. (R. 113) Lippert always travelled with her jewelry and had no previous problems. (R. 117, 769) Although both Lippert and her spouse knew she was carrying a substantial amount of uninsured jewelry, neither one took any precautions, nor did they obtain excess valuation insurance. (R. 776, 793, 795, 797) There was no request for a hand search, nor did Lippert give her property to her husband to guard while she went through the metal detector. She never asked her spouse to hold the bag and send it through the scanner after she could wait and watch for it on the "sterile" side. (R. 773)

The security checkpoint was staffed by six people: a stair guard plus five Wackenhut employees at the security checkpoint. (R. 238, 421) A sheriff's department deputy was also in the immediate vicinity standing approximately six to eight feet away. (R. 99, 421-423, 586, 587, 997) None of the employees were stationed at the end of the magnetometer to watch who picked up a particular parcel or property. (R. 236, 260, 276) There is no FAA requirement for such personnel placement, and, in any event, it would be impractical because one cannot see past the scanner machine to determine who has placed any given item on the conveyor belt. (R. 279, 427, 597, 598, 610, 611, 619) The Lipperts did not expect any Delta or Wackenhut employee to be at the end of the conveyor belt. (R. 143)

Lippert said she placed a Louis Vitton satchel containing approximately $430,000 in mostly uninsured jewelry on a conveyor belt for screening by the magnetometer.

When Lippert proceeded through the archway metal detector, she set off the alarm and had to walk though it again. (R. 78, 648-649) When she walked forward to collect her property, it was missing. (R. 97) She then sued Delta and Wackenhut, who was acting as Delta's agent "for the purpose of checking carry on baggage" of passengers boarding Delta flights. (Pet. App. G)

Delta and Wackenhut answered Lippert's complaint and alleged, among other things,[3] that their liability was limited to $1,250 based upon the terms and conditions of the ticket as well as the federal tariff.[4] The trial court initially entered partial summary judgment limiting any liability to $1,250. Despite the partial summary judgment, the trial court instructed the jury to determine the value of Lippert's total claim. The jury then returned a verdict for Lippert in the amount of $431,609, for which judgment was entered. (Pet. App. A, 2a-3a)

On appeal, a Florida intermediate court of appeal held, *inter alia*, that Delta's $1,250 federal tariff liability limitation did not apply, but ordered a new trial on other grounds. The question of the effect of the federal tariff on Lippert's right to recovery was certified to the Florida Supreme Court. (Pet. App. B)

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[3] Delta and Wackenhut also argued that they should have no liability whatsoever because Lippert's delivery of her property constituted a bailment by operation of law, and hence subject to a gross negligence standard, rather than a bailment for mutual benefit, which was subject to a simple negligence standard.

[4] The pertinent portions of the terms and conditions printed on the ticket are recited in the Florida Supreme Court opinion. (Pet. App. A, 4a-6a)

By a five to one majority[5], the Florida Supreme Court reversed the lower court's decision, finding that the wording of the ticket encompassed Lippert's handbag whether the item was "checked" or "carry on" because it "was a passenger's 'article or other property . . . acceptable for transportation . . . whether checked or carried . . . ' " as defined in the ticket's Conditions of Contract. (Pet. App. A, 4a, 7a) Furthermore, Florida's highest court determined that the limitation in the airline's tariff included Lippert's carry on bag regardless of whether it was characterized as "baggage." The court noted that section J(1)(a) of the tariff limited liability to $1,250 for fare-paying passenger's baggage or "other property" delivered into the custody of Delta. (Pet. App. A, 5a, 7-8a)

## REASONS FOR DENYING THE WRIT

### POINT I

### THE FLORIDA SUPREME COURT HAS PROPERLY INTERPRETED THE POSTED TARIFF AND TICKET.

The Florida Supreme Court correctly noted that the ticket's definition of baggage ("whether checked in the cargo compartment or carried in the cabin") is logically construed as emphasizing that the airline's contract with its passengers does not differentiate between carry on and checked baggage. The tariff is thus properly applied

[5] Justice Kogan dissented in part; Justice Barkett recused herself from the proceedings.

to all passengers' "property . . . acceptable for transportation . . . whether checked or carried . . . " The court correctly determined that "a ticketed passenger's property, destined for an airplane and in transit between the airport's security checkpoint and the actual airplane, constitutes 'baggage' as defined by the ticket." (Pet. App. A, 7a) The court rejected Lippert's argument that her property was not "baggage" until it entered the plane, finding that "this interpretation would lead to the dubious conclusion" that a passenger's property on route to a plane should not be considered baggage, either.[6] (App. A, 7a)

The Florida Supreme Court cited the case of *Feature Enterprises, Inc. v. Continental Airlines*, 745 F. Supp. 198 (S.D.N.Y. 1990). In this case, which involved a domestic flight, a ticketed passenger checked his bags "at curbside" with a skycap employed by International Total Services, Inc., an agent of Continental Airlines. Among his bags was a jewelry case allegedly containing $175,000 in jewelry. The sample case was never loaded onto the plane by either the airline or its agent because it was stolen by a third party during the short period it was "at curbside." The court granted summary judgment limiting the airline's liability to $1,250. The fact that the jewelry case had not been actually loaded into the cargo compartment of the plane did not prevent it from becoming property

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[6] This questionable interpretation, which the Florida Supreme Court rejected, was indeed reached by a lower court (the equivalent of a county court) in the case of *Tremaroli v. Delta Air Lines*, 458 N.Y.S. 2d 159 (N.Y. City Civ. Ct. 1983), which has no precedential value because it is not a decision by a state appellate court.

defined as "baggage" for purposes of the limitation of liability.

The Florida Supreme Court further explained that the tariff was properly applied even if a particular item of property is not characterized as "baggage." (App. A, 7a) The terms of the tariff at section J(1)(a), specifically limit the airline's liability for loss of a fare-paying passenger's baggage or "other property" delivered into the custody of the airline. (App. A, 7a-8a) The Florida Supreme Court correctly held that "the $1,250 baggage limitation was applicable to the loss of Ms. Lippert's handbag while it was in the possession of Delta's agent at the airport security checkpoint." (App. A, 8a) There can be no question that Lippert's bag was delivered into Delta's custody at the security checkpoint so that, as a ticketed passenger, her bag could be transported with her. (App. A, 8a) The court then noted that non-ticketed persons do not contract with the airline to transport their property and, thus, would not be subject to the limitation at the checkpoint. (App. A, 8a)

In so ruling, the Florida Supreme Court cited to the holding in the factually similar case of *Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165 (S.D.N.Y. 1984). The *Baker* plaintiff sued after approximately $200,000 worth of jewelry disappeared between the time she handed her bag to a security agent for x-ray scanning and the time that the property should have been returned to the plaintiff on the other side of the screening area. The screening preceded the plaintiff's boarding of a British Airways flight from New York to London, England. The security check point was manned by employees of Lansdell Protection Agency, Inc. Lansdell moved for partial

summary judgment and sought to limit its liability to $400 based upon limitations imposed by the Warsaw Convention, 49 U.S.C. § 1502 Note. In holding Lansdell's liability to a limit of $400, the trial court noted that Chapter 49 U.S.C. § 1356 required security checks to be performed either by employees or agents of the air carrier and that the same federal statute required all passengers and property intended to be carried in an aircraft cabin to be screened for weapons prior to boarding. The court noted that Lansdell was entitled to invoke the limitations of liability of the Warsaw Convention because the plaintiff was engaged in an activity that was a legally mandated prerequisite to boarding an airplane.

Cases controlled by the Warsaw Convention are analogous to cases involving tariffs governing interstate air travel. The tariff and contract of transportation govern the parties' rights and duties on interstate flights just as the Warsaw Convention terms and contract of transportation control on international flights. 14 C.F.R. § 254.1; *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp 611, 615 (S.D.N.Y. 1955). The case of *Julius Young Jewelry Mfg. Co. v. Delta Air Lines*, 414 N.Y.S.2d 528, 529 (App. Div. 1979) also illustrates how the purpose of the Warsaw Convention is analogous to the purpose of tariffs. In that decision, the court noted that "the fundamental purposes of the Convention are to limit liability so as to fix costs to airlines at a definite level and to establish a uniform body of world-wide liability rules to govern international aviation to aid recovery by users." The domestic tariffs serve the same purpose on a national level.

## POINT II

## LIPPERT ACKNOWLEDGES THAT THE TARIFF APPLIES "TO BAGGAGE GIVEN INTO THE AIRLINE'S CUSTODY FOR . . . TRANSPORT OR TO STORE TEMPORARILY" (Pet., p. 11), AND THIS MUST INCLUDE A SECURITY CHECKPOINT.

Lippert readily acknowledges that the tariff applies to property delivered to an airline for transport and property that is temporarily stored before or after a flight. (Pet., p. 11) Lippert then tries to split hairs and argue that the tariff should not apply to the property delivered to an airline's agent for the specific, statutorily imposed purpose of determining whether that property is even suitable for transport. This position, which requires a strained and tortured reading of the tariff, is wholly without merit.

Lippert illogically suggests that the security check of a passenger's property cannot be a "delivery" of that property for transport as envisioned by the tariff. A ticketed passenger's property examined at a security checkpoint is intended to go on the plane with the passenger and is not intended to be held in the originating airport pending the possible/eventual return of the property's owner. The property cannot be brought onto the aircraft with the passenger unless and until it has cleared the security checkpoint. A ticketed passenger's property is delivered to the airline for inspection during the embarking procedure applicable to the transport of *that* person and *that* property. There is no merit to Lippert's position that this federally mandated security screening is not a stage in the airline's transportation process.

Next, Lippert argues hypothetically that the Florida Supreme Court's ruling would necessarily limit the claim of any person going through a security checkpoint, even if just to see someone off on a plane, as long as that person held a ticket for a flight to be taken a week, a month, or a year later. (Pet., p. 13) By Lippert's own admission, this is an "absurd" result. The Respondents agree that such a result is so absurd as to be totally outside of any intelligent reading of the Florida Supreme Court's opinion. The court was clearly rendering its opinion based on the facts of the instant case involving Lippert. Lippert was a ticketed passenger moving her property through the various transporting procedures with the full intention of boarding the airplane that day. In its opinion, the court repeatedly referred to Lippert's bag as falling within the ambit of the contract of carriage. Lippert's property had clearly been delivered for transport within the plain meaning of both the tariff and terms of the ticket. The opinion does not suggest that someone who is merely visiting the airport and happens to hold a ticket for another day will be bound by the limitation if he loses an item at the checkpoint. In any event, a non-traveller is unlikely to be carrying large amounts of valuables.

Creating such a strained and tortured reading of the opinion in order to raise "doubt" about the meaning of the tariff indicates the weakness of Lippert's position in this petition.[7] In interpreting air tariffs, the terms of the

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[7] Lippert also references a provision of the tariff (never raised by the Respondents) in which the airline states that it will not be responsible for valuables such as cash, jewelry and

tariff should be given their ordinary commercial meaning. *Emery Air Freight Corp. v. United States*, 499 F.2d 1255, 1259 (Ct. Cl. 1974). The terms of the tariff must be taken in the sense in which they are generally used and accepted and must be construed in accordance with the meaning of the words used. *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971) (and cases cited therein). Although an ambiguity in a tariff is to be construed against the drafter, the ambiguity must be a reasonable one and not "the result of a straining of the language." *Id.* at 1341. Most important, "there must be a substantial and not a mere arguable basis in order to justify resolving the doubt against the carrier." *Id.* at 1341 (and cases cited therein). Rules relating to tariffs "should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results." *Id.* at 1341 (and cases cited therein). Finally, "a strict construction of a tariff against a carrier is not justified where such a construction ignores a permissible and reasonable construction which conforms

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camera equipment contained in checked or unchecked baggage and advising passengers to carry these items. Clearly, this "advisory" by the airline alerts passengers to purchase excess valuation if valuables cannot remain on the person. Lippert did not keep the jewelry on her person, but instead placed it in an unchecked carry on bag and then placed the bag in the custody of the airline for inspection so it could be transported. Even a male passenger, with his presumably large number of pockets, would be hard pressed to carry $430,000 in jewelry on his person and would have to transport such property in carry on baggage.

to the intentions of the framers of the tariff, avoids possible violations of law, and accords with the practical application given by shippers and carriers alike." *Id.* at 1341 (and cases cited therein).

Lippert erroneously attempts to breath life into the quashed intermediate court of appeal opinion which concluded that "the tariff and its limitation on liability do not apply where the passenger is forced to relinquish possession of his or her valuables for the purpose of a security magnetometer check." (Pet. App. B) What Lippert ignores, and the lower court did not consider, is the fact that passengers frequently have an involuntary, mandated separation from their property. The relinquishment of property to ensure that it is suitable for transport is no different from a mandated, last minute relinquishment of property which routinely occurs on board an airline. For example, a passenger may suddenly discover that a carried object is too big to fit under the seat or in the overhead bin and therefore the property will not be transported unless it is relinquished for placement in the cargo hold.

Lippert also ignores the fact that she had the option to request a hand search of her property and need not have relinquished it at all. She did not elect to place her property "in a tray on a table next to the archway." (Pet., p. 19) She also chose not to permit a security officer to directly view the contents of her bag. Lippert, an experienced traveller, knew full well that she could not board the aircraft without permitting the airline to determine the suitability of her property for transport, either by a hand search or by a magnetometer examination.

## POINT III

## APPLICATION OF THE TARIFF PERMITS THE AIR CARRIER TO DETERMINE ITS RATES ACCORDING TO RISKS ASSUMED.

This Court's comments on the federal law permitting carriers to limit liability is instructive. In *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936), this Court reasoned as follows:

> The underlying principle is that the carrier is entitled to base rates upon value and that *its compensation should bear a reasonable relation to the risk and responsibility assumed* . . . The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their uniform application.

(emphasis added). *See also Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla.), *aff'd.*, 477 F.2d 564 (5th Cir. 1973) (citing *Southeastern* for the proposition that "public policy favors the right of a carrier to determine its rates according to the risk assumed").

Responsibility for a passenger's large cache of uninsured jewelry is clearly not the type of risk that airlines or their agents are required to assume. Both the ticket and the tariff alert the passenger to the need to obtain excess valuation insurance if the passenger intends to carry jewelry or other similar valuable items in either checked or unchecked baggage. If the tariff is not applied, there would be unlimited liability imposed on an airline and its agents for loss or damage to valuable items because, by law, all property must be delivered into the custody of the airline through its employees or agents for pre-boarding inspection. Carving such a massive exception into the

balance of "risk and rates" in existence plays havoc with congressional intent to encourage reasonable rates by the airlines for domestic air travel.

## POINT IV

## PUBLIC POLICY SUPPORTS APPLICATION OF THE TARIFF.

It is the public policy of the United States to protect the airlines and their fare-paying passengers by making the small class of passengers carrying items of high value personally responsible for their own losses, so as to hold down air transportation costs. The Department of Transportation, the agency authorized by Congress to regulate aviation, has determined that charging carriers with liability for such valuable items "would add significantly to carrier insurance costs" and "the cost to consumers would inevitably rise." *See Complaint against limitation of liability tariffs of Braniff Airways, Inc. and Northwest Airlines, Inc.*, Docket 40373 (U.S. Dep't of Transp. Order Dismissing Complaint issued Dec. 2, 1987) (Pet. App. A, 7a) Compliance with this policy is particularly important in light of the recent bankruptcies of such air carriers as Pan American Airlines, Eastern Airlines and Trans World Airlines. Without application of this tariff, it would be impossible for airlines to foresee or control potential liability and costs.

Delta and its agents should not be made the insurer of Lippert, who chose to carry a portable vault of uninsured jewelry with her on her travels. Her actions fall within the type of risk that the federal government has permitted the airlines and their agents to avoid so that

airlines may charge reasonable rates and avoid unreasonable losses. It is foreseeable that ticketed passengers may transport valuables on a trip. Public policy permits an airline to mitigate the risk of loss of passengers' valuables by the terms of its tariff and ticket. It is not likely, however, that people who are merely seeing others off at airports would bring along large caches of jewelry or other valuables. Moreover, the Florida Supreme Court correctly noted that the limit of liability would not apply to non-passengers who have not contracted with airlines regarding their property.

## POINT V

## APPLICATION OF THE TARIFF IS NECESSARY FOR UNIFORMITY OF RESULTS.

The purpose of a screening device is to make sure that no one who is embarking on a plane or is otherwise accessible to travelers has a weapon or other incendiary device. Thus, the x-ray screening is obviously part of the embarking procedure for ticketed passengers. The security screening that took place in this case is unquestionably a *service* of Delta. This Court has held that the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1) unmistakably manifests the intent of Congress to preempt state common law tort actions relating to air transportation *services* of any air carrier. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). In the *Morales* decision, this Court stated:

> To ensure that the States would not undo federal deregulation with regulation of their own, the ADA [Airline Deregulation Act] included a pre-emption provision, prohibiting the States from

> enforcing any law "relating to rates, routes, or services" of any air carrier.

*Id.* at 2034. *See also O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989) and *Von Anhalt v. Delta Air Lines, Inc.*, 735 F. Supp. 1030 (S.D. Fla. 1990).

The decision by the Florida Supreme Court conforms to this Congressional intent, as explained in *Morales*, and ensures that cases of this type are handled uniformally by the courts throughout this nation under a federal law based on a federal tariff, rather than subject to the variances of state tort law. Furthermore, there is no conflict between this decision and any other appellate decision in the United States. Finally, as admitted by Lippert (Pet., p. 20), her case is highly unusual and unlikely to reoccur.

## CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Felice Lippert's petition for writ of certiorari should be denied.

Respectfully submitted,

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